

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>TINA C. RAUSCH</b>	)	
Claimant	)	
VS.	)	
	)	
<b>SEARS ROEBUCK &amp; COMPANY</b>	)	Docket No. 1,039,744
Respondent	)	
AND	)	
	)	
<b>INDEMNITY INSURANCE COMPANY OF</b>	)	
<b>NORTH AMERICA</b>	)	
Insurance Carrier	)	

**ORDER**

Respondent appeals the July 11, 2008 preliminary hearing Order of Administrative Law Judge John D. Clark (ALJ). Claimant was awarded benefits in the form of medical treatment with Dr. John Estivo as the authorized treating physician after the ALJ found that claimant had suffered an accidental injury which arose out of and in the course of her employment with respondent.

Claimant appeared by her attorney, Roger A. Riedmiller of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney, Clifford K. Stubbs of Roeland Park, Kansas.

This Appeals Board Member adopts the same stipulations as the ALJ, and has considered the same record as did the ALJ, consisting of the transcript of the Preliminary Hearing held June 17, 2008, with attachments; the transcript of the Evidentiary Deposition of Lisa Hopkins dated July 9, 2008, with attachments; the transcript of the Evidentiary Deposition of Victor Reynolds dated July 9, 2008; the transcript of the Evidentiary Deposition of Pierre Njanga dated July 9, 2008; the transcript of the Evidentiary Deposition of Gary D. Andres dated July 9, 2008; and the documents filed of record in this matter.

**ISSUES**

1. Did claimant prove that she suffered an accidental injury which arose out of and in the course of her employment? Respondent contends that claimant suffered upper extremity, bilateral shoulder and neck

pain due to conditions not related to her work with respondent. Respondent further contends that claimant, after being asked, denied on several occasions, and to several people, that her pain was the result of working for respondent.

2. Did claimant provide timely notice of this accident to respondent? This issue was neither raised to nor decided by the ALJ.

#### **FINDINGS OF FACT**

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be affirmed.

Claimant alleges that she suffered accidental injuries to her upper extremities, shoulders and neck as a result of heavy lifting for respondent, while unloading merchandise from delivery trucks. Claimant testified that she talked to several of her supervisors about her upper extremity problems, but was never offered medical treatment. Claimant testified that she told Jim Kiser, the store's general manager, Lisa Hopkins, her supervisor, and respondent's operations manager, Pierre Njanga, respondent's operations manager, and Gary Andres, respondent's loss prevention manager about her upper extremity problems and that they were work-related.

Respondent's representatives deny that claimant told them that her problems were work-related. Respondent's witnesses acknowledge knowing that claimant was having problems with her shoulders. In particular, claimant was seen avoiding any lifting while at work. But, when claimant was asked, she allegedly, denied the problems were work-related. In fact, Mr. Njanga was aware that claimant was having shoulder problems as early as late September, 2007. This was during the time that claimant was still unloading trucks. At some point in late 2007, claimant stopped unloading the trucks. Apparently, this cessation in activity was at the direction of Mr. Njanga. Claimant was told to stop doing anything which would exacerbate claimant's problems.<sup>1</sup>

Claimant originally discussed her shoulder problems with Mr. Anders in October, 2007. At that time, claimant was seen avoiding the lifting required of her job. Mr. Anders alleges that, when asked, claimant denied the shoulder problems were work related. But he also agrees that the lifting was causing claimant difficulty, which is why she stopped doing it.

Claimant alleges that she told Lisa Hopkins, respondent's human resources lead, of her problems. Ms. Hopkins acknowledges discussing the problem with claimant in January 2008, but testified that claimant denied the problem was work-related. However,

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<sup>1</sup> Njanga Depo. at 14.

at approximately the same time this January 2008 conversation took place, claimant was receiving treatment with GraceMed Health Clinic, Inc. A January 10, 2008 note from GraceMed states that claimant was experiencing bilateral shoulder and upper extremity pain. The note goes on to say that claimant did lifting at work and was trying to avoid heavy lifting.

### **PRINCIPLES OF LAW AND ANALYSIS**

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.

If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.

Here, claimant alleges she injured her upper extremities and neck from the heavy lifting associated with her job. Several of respondent's representatives acknowledge that claimant was seen limiting her lifting at work due to shoulder pain. Contemporaneous with these observations, claimant was seeking medical treatment for upper extremity pain, with the lifting at her job being identified in the medical reports as a contributing factor. Additionally, claimant as advised by Mr. Njanga to avoid any activity which might exacerbate her problems. Claimant then ceased doing the heavy lifting at work.

This Board member finds that claimant has satisfied her burden that she suffered accidental injuries which arose out of and in the course of her employment with respondent.

The Board is limited under K.S.A. 2007 Supp. 44-551 to reviewing issues presented to and decided by an administrative law judge.

Respondent argues that claimant failed to provide timely notice of her accident. However, that issue was not raised at the time of the preliminary hearing and was not decided by the ALJ in the Order of June 17, 2008. As such, the Board does not have jurisdiction to decide the issue of timely notice.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.<sup>2</sup> Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2007 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

### **CONCLUSIONS**

Claimant has satisfied her burden that she suffered accidental injuries which arose out of and in the course of her employment. The decision by the ALJ to grant benefits is affirmed. Respondent's attempt to raise the issue of timely notice to the Board is dismissed.

### **DECISION**

**WHEREFORE**, it is the finding, decision, and order of this Appeals Board Member that the Order of Administrative Law Judge John D. Clark dated July 11, 2008, should be, and is hereby, affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of October, 2008.

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HONORABLE GARY M. KORTE

c: Roger A. Riedmiller, Attorney for Claimant  
Clifford K. Stubbs, Attorney for Respondent and its Insurance Carrier  
John D. Clark, Administrative Law Judge

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<sup>2</sup> K.S.A. 44-534a.